Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SEVERIN YANWING YU,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ALAMEDA

PEOPLE OF THE STATE OF CALIFORNIA,

Real party in Interest.

On Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether admission of expert testimony about the Child Sexual Abuse Accommodation Syndrome, without any preliminary finding of reliability and relevance, impermissibly bolsters the prosecution's case and violates a defendant's right to a fair trial and to due process of law.

2. Whether *Miranda* warnings are required when a defendant not proficient in English is questioned in a small, closed room on school grounds by armed police officers. Whether a statement given under such circumstances can be considered knowing and trustworthy.

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PETITION FOR WRIT OF CERTIORARI

SEVERIN YANWING YU respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, First Appellate District, in this case.

OPINIONS BELOW

The California Court of Appeal, First Appellate District, denied Yu's appeal on all grounds on June 8, 1999. The opinion of the Court of Appeal is unreported. *Infra*, App. 1.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 on the grounds that petitioner's rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated.

The California Court of Appeal entered its judgment rejecting petitioner's Fifth and Fourteenth Amendment claims on June 8, 1999. *Infra*, App. 1. The Court of Appeal denied the Petition for Rehearing on July 7, 1999. The California Supreme Court denied the Petition for Review on August 25, 1999. The instant Petition for Writ of Certiorari is filed within 90 days of that order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257(a) states that

> [f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

California Penal Code § 288(a) states that

> Any person who willfully and lewdly commits any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part of member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

California Penal Code § 288(c)(1) states that

> Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state

prison for one, two, or three years, or by imprisonment in a county jail for not more than one year. In determining whether the person is at least 10 years older than the child, the difference in age shall be measured from the birth date of the person to the birth date of the child.

California Penal Code § 289(i) states that

Except as provided in Section 288, any person over the age of 21 years who participates in an act of penetration of the genital or anal openings with a foreign object, substance, instrument, or device, or by any unknown object of another person who is under 16 years of age or causes another person under 16 years of age to so penetrate the defendant's or another person's genital or anal openings for the purpose of sexual gratification, or abuse, shall be guilty of a felony.

STATEMENT OF THE CASE

Petitioner Severin Yanwing Yu ("Yu") was charged with sexual touching of his daughter and niece (violations of California Penal Code § 288(a), 288(c)(1) and 289(i)), after his daughter filled out a school questionnaire that her father touched her. Mr. Yu was called to the school and questioned in a small room by three armed police officers. He was not given any *Miranda* warnings. Mr. Yu was questioned in English, without the presence of a Cantonese interpreter. During the interview, Yu gave a tape recorded statement that the police interpreted as acknowledging inappropriate "touching". RT 430-433,

730-731. At trial, Yu was assisted by a Cantonese interpreter. Yu explained that he had said "teaching" in his heavily-accented English, not "touching". RT 732-733.

Both the daughter and niece were questioned by police and initially stated that Yu had touched them. RT 382, 388. The niece soon notified law enforcement that she had not been touched by Yu, and she so testified at the preliminary hearing. The daughter gave many different accounts – some which accused her father of molestation and some which denied it.

At trial, both girls denied that any touching had taken place. RT 163-170, 323-326. Over defense objection, the prosecution presented expert testimony about Child Sexual Abuse Accommodation Syndrome (CSAAS) without any foundational requirement of reliability. RT 490-525.

Mr. Yu testified at trial and denied all charges. The jury convicted him of the charges involving his daughter, and acquitted him of the charges involving the niece.

Yu moved to suppress his pre-arrest statements made during a tape-recorded interview by police on the grounds that the statements were obtained in violation of *Miranda* and the Fifth Amendment, and were untrustworthy. CT 124-167, 281-286. The trial court denied the motion on the ground that Yu was not "in custody" during the interview and his statements were voluntary. RT 105-106, 822.

On appeal, the Court of Appeal upheld the trial court's denial of the Motion to Suppress the Statement.

Yu moved *in limine* to exclude the testimony of the Child Sexual Abuse Accommodation Syndrome expert on the grounds that it did not meet the requirements of *Kelly*[1]*-Frye*, and that it was prejudicial. RT 361-362. Yu argued that if the court was going to allow the testimony, that it should be reserved for rebuttal. RT 365. Yu also argued that a limiting instruction should be given prior to the expert's testimony. RT 367. The Court denied the motions and admitted the CSAAS evidence in the prosecution's case-in-chief without any finding of reliability and without any concurrent limiting instruction. RT 373.

On appeal, petitioner argued that the admission of expert testimony on CSAAS deprived petitioner of due process on the grounds that the testimony improperly influenced the jury's determination of the credibility of the alleged victims' trial testimony. As there was no physical evidence, and the entire case turned on the credibility of the defendant and the alleged victim's, the jury assessment of credibility was crucial.

The Court of Appeal upheld the trial court's denial of the motion to exclude expert testimony about CSAAS.

REASONS FOR GRANTING THE PETITION

Review should be granted in this case because the erroneous admission of expert testimony about Child Sexual Abuse Accommodation Syndrome in this case rendered the trial arbitrary and unfair. The procedures used

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[1] *People v. Kelly*, 17 Cal.3d 24, 549 P.2d 1240, 130 Cal.Rptr. 144 (1976).

to convict Yu in state court violated his Fourteenth Amendment right to due process. U.S. Const. Amend. XIV.

In this case, both the daughter and niece initially stated that Yu had touched them when questioned by the police. At trial, both girls denied that Yu had molested them. The use of CSAAS testimony by the prosecution to impeach their own witnesses because the alleged victims testified at trial that the molestation did not occur impermissibly bolstered the prosecution's case. Introduction of the CSAAS testimony was especially prejudicial in this case where there was no physical corroboration for the allegations and the court improperly admitted the defendant's interview by the police. The evidence about the statement was untrustworthy and unreliable.

Review should be granted by this court to evaluate whether the California practice of admitting CSAAS testimony without any finding of reliability or relevance comports with due process in light of *Kumho Tire Co. v. Carmichael*, 526 U.S. ___, 143 L.Ed.2d 238, 119 S.Ct. ___ (1999).

I. The admission of CSAAS testimony created an absence of fundamental fairness that fatally infected the whole trial.

Denial of due process in a criminal trial is the failure to observe that fundamental fairness essential to the very concept of justice. Federal court interference is unwarranted unless the acts complained are of such quality as necessarily prevents a fair trial. In this case, the admission of CSAAS testimony in the prosecution's case-in-

chief improperly bolstered the prosecution's case and fatally infected the trial.

In *People v. Bowker*, 203 Cal.App.3d 385, 249 Cal.Rptr. 886 (1988), the California Court of Appeal noted that CSAAS testimony could not be used to determine when a particular child has been abused, although general testimony could be admitted for the limited purpose of disabusing the jury of misconceptions as to how child victims react to abuse. *Id.* at 392. The court cautioned that even general testimony on CSAAS is not admissible in every child abuse case. The court recognized that an expert's opinion carries crucial and often determinative weight with a jury. *Id.* at 390. The court held that such testimony should be severely limited to prevent it from misapplication as a predictive index by the jury.

In the ten years since *Bowker*, California trial courts have become so lax about enforcing any foundational requirements of CSAAS that many courts now allow introduction of such testimony in the prosecution's case-in-chief. Further, the trial courts routinely accept the prosecutions' proffer that such testimony is needed to counter "myths" about child sexual abuse without requiring any showing that such "myths" exist or apply to the case at bar.

In this case, defense counsel had argued that CSAAS testimony should be precluded on the grounds that it did not meet the requirements of *Kelly-Frye* and *Daubert*. RT 361. The trial court abandoned any "gatekeeper" role as to the reliability and relevance of such testimony and only asked the prosecutor whether she had any cases indicating that this [testimony] is admissible. RT 362. The government offered two cases, *People v. Bowker*, 203

Cal.App.3d 385, and *People v. McAlpin*, 812 P.2d 563, 283 Cal.Rptr. 382 (1991). She also proffered that this expert has testified approximately 35 times as an expert in the CSAAS area. RT 362.

The defense argued that the prosecution is trying to introduce the testimony in their case-in-chief rather than as rebuttal. The defense pointed out that the government had not identified or established any "wildly held misconception" as required by the earlier cases for admission of any CSAAS testimony. RT 365. *See Bowker, id.*

The prosecution argued that "[defense counsel] made a big to-do about this whole retraction issue in his opening statement". RT 368. The prosecution argued that the CSAAS testimony would assist the jury in understanding that testimony of victim recantation necessarily fell within the typical responses of children who have been molested. RT 369. Instead of pointing to exoneration, such "exonerating" testimony should (in the prosecution's view) point to conviction. This, in effect, means that whatever the [alleged] victim says at trial, the defendant is guilty of the charges.

The trial court admitted the expert testimony over the objections of defense counsel on the basis of several assumptions. First, the trial court appears to have concluded that no detailed foundation was necessary because *Bowker* sanctioned the admission of expert testimony about the characteristics of sexually abused children. Second, the trial court was persuaded that the testimony was analogous to "battered women's syndrome" evidence that was held admissible in *People v. Humphrey*, 13 Cal.4th 1073, 921 P.2d 1 (1996).

A. Expert testimony about CSAAS should not be admitted without a preliminary finding of reliability and relevance.

In California, the California Supreme Court declined to follow this Court's decision in *Daubert v. Merrill Dow Pharmaceuticals Inc*, 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993), and still applied the requirements of *Kelly* in evaluating the admission of "new" scientific evidence. *People v. Leahy*, 8 Cal.4th 587, 34 Cal.Rptr.2d 663 (1994), California courts have traditionally distinguished between expert medical opinion and scientific evidence and did not subject the former to the special admissibility rule of *Kelly-Frye*. *People v. Ward*, 71 Cal.App.4th 368, 83 Cal.Rptr.2d 828 (1999).

In *People v. Bowker*, 203 Cal.App.3d 385 (1988), the California Court of Appeal held that CSAAS testimony was not considered "new scientific evidence" and did not have to satisfy the strict requirements of *Kelly-Frye*. The convoluted reasoning of the court was that it did not have to meet any reliability testing that because the testimony was not admitted for the purpose of demonstrating abuse, but rather only permitted for the limited purpose of disabusing the jury of misconceptions as to how child victims react to abuse. *Bowker, id.* at 392. The reasoning that expert opinion testimony should not be subject to any testing is fatally flawed.

Given this court's recent decision in *Kumho Tire Co. v. Carmichael*, 526 U.S. ___, 143 L.Ed.2d 238, 119 S.Ct. ___ (1999), that the trial court should make a reliability finding to all expert testimony, even skill- or experience-

based expert testimony, *Id.* 143 L.Ed.2d at 251, California's evidentiary distinction between "new scientific evidence" and other expert testimony is no longer valid.

The objective of the gate-keeping requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, applies in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Kumho Tire, id.*, at 254.

Yu asserts that the trial court erred in admitting the expert opinion testimony about CSAAS because the court did not first require an adequate foundational showing that the scientific premises upon which such testimony was based are inherently reliable. Further, there was no showing that the scientific principles or techniques in question were generally accepted in the relevant scientific community and therefore eligible for judicial notice.

Although the court found that Dr. Urquiza was an expert, the court made no finding that the scientific principles and techniques upon which his testimony was to be grounded was reliable.

B. Admission of CSAAS testimony unfairly prejudiced petitioner by bolstering the prosecution's case.

In 1984, the California Supreme Court cautioned that permitting a person in the role of an expert to suggest that because the complainant exhibits some of the symptoms of rape trauma syndrome, the victim was therefore

raped, unfairly prejudices the appellant by creating an aura of special reliability and trustworthiness. *People v. Bledsoe*, 36 Cal.3d 236, 251, 681 P.2d 291, 203 Cal.Rptr. 450 (1984). The *Bledsoe* court held that such expert testimony is only admissible to disabuse the jury of some widely held misconceptions of rape and rape victims so that it may evaluate the evidence free from the constraints of popular myths. *Id.*, 36 Cal.3d at 247-248.

Since that time, courts have relied on "myths" and "misconceptions" as the reason why experts are allowed to testify about the child sexual abuse accommodation syndrome, despite the danger that the jury would misapply such information as a predictive index. In *People v. Bowker*, 203 Cal.App.3d 385 (1988), the court cautioned that the use of CSAAS expert testimony should be severely limited. The court noted that "general" testimony on CSAAS is not admissible in every child abuse case. At a minimum, the evidence must be targeted to a specific "myth" or misconception suggested by the evidence. *Id.*, at 393-394.

Unfortunately, the threshold set by the Court of Appeal is now interpreted so broadly as to be non-existent. In *Bowker*, the court noted that a psychologist could testify where an alleged victim recants his story in whole or in part, rationalizing that such behavior is not an uncommon response for an abused child. The court reasoned that given a proper limiting instruction, the jury would understand that the testimony is admissible solely for the purpose of showing that the victim's action [in giving inconsistent versions of what happened] was not inconsistent with having been molested. *Id.* at 394.

In *Bowker*, the court stated that the testimony presented far exceeded the permissible limits of the *Bledsoe* exception and strongly criticized the presentation by the prosecutor. The evidence in *Bledsoe*, like here, was offered during the prosecution's case-in-chief, suggesting that its purpose was not to rebut defense attacks on the alleged victims' credibility. The examples used by the expert just "happened" to match the actual facts of the case being tried before the jury.

The problem with the *Bowker/Bledsoe* approach is that the "myth" or "misconception" which now serves as the threshold foundation for the admission of CSAAS testimony may be as simple as a denial by the alleged victim. However, any change in testimony by a witness always raises an issue as to the witness' credibility. In order to cloak a "lie" in clinical terms, such a change in testimony in a sexual abuse case is labeled "recanting". Furthermore, the term "recant" confers a sense of reliability to the earlier statement.

The rationalization that CSAAS testimony is pertinent and admissible if an issue has been raised as to the [alleged] victim's credibility fails to acknowledge that the prosecution witness in any other type of criminal case would not be shielded by a "syndrome" justification. The rationale that such testimony is necessary to rebut defense [counsel's] attack on a victim's credibility is not correct. Defense counsel is not attacking the alleged victim's credibility. It is the prosecutor who is attacking his or her credibility because the present testimony does not match the earlier version.

The Court of Appeal reasoned in the instant case that CSAAS evidence is properly admitted to rehabilitate the victims' credibility. Such reasoning ignores the fact that the government was trying to "rehabilitate" the witness and bolster the credibility of her earlier inconsistent statement. Both alleged victims testified at trial that their earlier claims of molestation were false. These statements were elicited during the prosecution's case-in-chief, and were not "suggested" by the defense. Furthermore, the defense did not "suggest" theories why the earlier statements were false and did not attack the credibility of their trial testimony. It was the witnesses themselves that stated their earlier statements were false. The witnesses would have given the same explanations on direct examination if the prosecution had bothered to ask them.

It was not the defendant but the prosecutor who cast doubt on the veracity of the [alleged] victim's testimony. In order to bolster the credibility of their earlier inconsistent statements, the government sought to introduce CSAAS testimony. The court should recognize that it was the prosecution who was claiming that the trial testimony was false, not the defense.

C. The reliability and probative value of CSAAS testimony has been questioned in other jurisdictions.

In *People v. Bowker*, 203 Cal.App.3d 385 (1988), the Court of Appeal recognized as a misuse of the syndrome the admission of child sexual abuse syndrome testimony as substantive proof that abuse has been detected in a particular case. The court in *Bowker* held that expert

testimony used to rehabilitate a witness concerning delays and recantation could be admitted, but directed that jury be instructed not to use the testimony to determine whether the victim was molested.

The use of syndrome evidence for rehabilitative purposes has not met with universal approval.

Although admissible in California if such "paradoxical behavior" raises a question about the alleged victim's credibility, a number of courts in other jurisdictions have questioned the reliability and probative value of CSAAS testimony. See *Commonwealth v. Dunkle*, 529 Pa. 168, 602 A.2d 830 (Pa. 1992); *State v. Rimmasch*, 775 P.2d 388, 401 (Utah 1989) (noting that abuse syndrome theory has been criticized because "psychological characteristics said to be indicative of abuse may also describe persons suffering from a wide range of emotional problems unrelated to sexual abuse"); *United States v. Bighead*, 128 F.3d 1329, 1338-39 (9th Cir. 1997) (Noonan, J., dissenting).[2] At least

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[2] In *Bighead*, Judge Noonan quoted the Supreme Court of Pennsylvania's explanation of why the CSAAS testimony in *Dunkle*, which was similar to that presented in this case, was not probative:

> The symptoms of anger and of rebellion which [the expert witness] identified as symptomatic of abuse did not significantly distinguish the sexually abused child from other kinds of angry or rebellious children. . . . The court observed that [the expert's] testimony "does not render the desired inference more probable than not. It simply does not render any inference at all. Rather, it merely attempts – in contravention of the rules of evidence – to suggest

one California court has acknowledged that CSAAS testimony "can be highly prejudicial if not handled properly by the trial court." *People v. Patino*, 26 Cal.App.4th 1737, 32 Cal.Rptr.2d 345 (1994).

In *Dunkle*, the Pennsylvania Supreme Court prohibited from admission in child sexual abuse cases essentially all expert testimony concerning behavior patterns. *Dunkle*, 529 Pa. 168, 602 A.2d 830. The evidence sought to explain in general terms, without reference to the alleged victim, "why a victim would delay reporting an offense, why a victim might be unable to recall exact dates and times of an alleged offense, and why victims of sexual abuse omitted details of the incident when they first told their stories." *Dunkle*, 602 A.2d at 831. Permitting such evidence, the *Dunkle* court believed, "would infringe upon the jury's right to determine credibility," because the reasons for delay, inconsistencies, and omissions in victims' allegations are easily understood by lay people.

The Pennsylvania Supreme Court found that expert testimony about the behavior patterns exhibited by sexually abused children does not meet this threshold determination. While it may "bear upon a matter in issue," it does not render the desired inference more probable than not. It simply does not render any inference at all. The Pennsylvania Supreme Court recognized that such testimony was a clear attempt in contravention of the

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> that the victim was, in fact, exhibiting symptoms of sexual abuse."

128 F.3d at 1339 (quoting *Dunkle*, 602 A.2d at 838).

Pennsylvania rules of evidence – to suggest that the victim was, in fact, exhibiting symptoms of sexual abuse. *Id.*

Similar concerns regarding the misuse of CSAAS testimony are presented by the instant case. There was no corroboration for any of the alleged molests. The prosecutor argued that the "recanting" by the prosecution witnesses supports the admission of the CSAAS testimony. While the earlier cases had limited the use of such testimony to rebut defense attacks on the witnesses' credibility, the trial court here allowed the admission of such evidence based merely on the government's proffer that the witness has "recanted".

The uncritical use of CSAAS testimony in this case fatally infected the trial because it provided an "expert" bolstering to the prosecution's argument that if the alleged victim testifies that she was molested, then she must have been molested, but if she testifies that she was not molested, that is still consistent with molestation. Juries are traditionally the "truth-finders" in the courtroom, and the CSAAS testimony usurps that role.

The jury in this case deliberated for five days before returning their verdicts. As stated before, there was no physical corroboration for the girl's initial statements that they had been molested. Both girls testified at trial that they had not been molested. The admission of the CSAAS testimony allowed the government to argue that the change in testimony was not inconsistent with them being molested. Given the record in this case, admission of CSAAS testimony was clearly prejudicial.

The use of the CSAAS testimony deprived Yu of a fair trial in two ways: first, the jury was not cautioned in a timely and effective manner not to consider the testimony as proof that molestation had occurred; and second, the jury was improperly influenced in its assessment of the credibility of the alleged victims' trial testimony. *See Commonwealth v. Dunkle*, 602 A.2d 830, 831; *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985) Because the girls' out-of-court, recanted accusations were, apart from Yu's challenged pre-arrest statements, the only evidence of molestation, it is reasonably probable that had the CSAAS testimony been properly handled, a verdict in favor of Yu would have resulted. *Compare with People v. Bowker*, 203 Cal.App.3d 385, 395 (1988).

The previous restrictions on the use of CSAAS testimony have been seriously eroded over the years. Despite the warning in *Bowker* that it can be highly prejudicial if not properly handled by the trial court, the California trial courts now ignore all the procedural safeguards. This practice deprived petitioner of a fair trial and justifies the granting of the petition. The granting of the petition is also justified by the diversity of the rules on the subject. *See* Section I.C. In the alternative, due process requires that a preliminary finding of reliability and relevance as required by *Daubert* and *Kumho Tire* should apply in this case.

The admission of CSAAS testimony in this case deprived petitioner of a fair trial.

II. Yu's statement was obtained in violation of *Miranda*.

The trial court denied Yu's motion to suppress his pre-arrest interview on the grounds that Yu was not in custody when he was questioned by police at the school and that the statements he made to police at that time were voluntary. RT 105-106, 822. The court erred in concluding that the police were not required to advise him of his rights pursuant to *Miranda*.

Miranda warnings are required when a suspect is taken into custody "or otherwise deprived of his freedom by the authorities in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 478 (1966); *see also Stansbury v. California*, 511 U.S. 318, 322-23 (1994); *People v. Mayfield*, 14 Cal.4th 668, 732, 928 P.2d 485, 60 Cal.Rptr.2d 1, *cert. denied*, 118 S.Ct. 116 (1997). A suspect may be in custody for *Miranda* purposes absent a formal arrest. The pertinent question is "how a reasonable man in the suspect's position would have understood his situation." *Stansbury v. California, supra*; *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); *People v. Esqueda*, 17 Cal.App.4th 1450, 1481, 22 Cal.Rptr. 126 (1993). If a reasonable person is led to believe that he is physically deprived of his freedom of action in any significant way, that person is "in custody" for purposes of *Miranda*. *People v. Lopez*, 163 Cal.App.3d 602, 608, 209 Cal.Rptr. 575 (1985). In determining whether a detention has become a custodial interrogation in the absence of a formal arrest, a court must examine all of the circumstances surrounding the interrogation. *Stansbury v. California*, 511 U.S. at 322; *People v. Whitfield*, 46 Cal.App.4th 947, 953, 54 Cal.Rptr.2d 370 (1996). Relevant

factors include the length of the detention, the location of the interrogation, the ratio of officers to suspect, whether the indicia of arrest are present, and whether the investigation had focused on the suspect, if this is communicated to the suspect. *Stansbury v. California*, 511 U.S. at 324; *Whitfield*, 46 Cal.App.4th 947 at 953.

At a suppression hearing, the prosecution has the burden of proving that a custodial interrogation did not take place. *Whitfield*, 46 Cal.App.4th at 953.

Here, Yu initially agreed to answer Officer Mayo's questions early in the interview. When it ended, Yu was formally arrested. At some point before his formal arrest, when he was being questioned in an increasingly accusatory manner in a small room, alone with three police officers, a reasonable person in Yu's position would not have felt free to leave. See *People v. Lopez*, 163 Cal.App.3d 602, 608, n. 4 ("Accusatory questioning is more likely to communicate to a reasonable person in the position of the suspect, that he is not free to leave."); *Tankleff v. Senkowski*, 135 F.3d at 244 (defendant was in custody at some point during a police interrogation which began consensually and should have been advised of his *Miranda* rights much earlier than he was).

In the course of Yu's interview, which lasted approximately a half-hour, a second armed officer entered the room. Then a third officer joined his peers. Yu was alone in a small room with three armed police officers. He was isolated in this closed room with the police. He was questioned by the officers in English without the benefit of a Cantonese interpreter. When his wife tried to enter, approximately half way through the questioning, she was

told to wait outside. See Exhibit 5 (tape); Exhibit N (transcript) at p. 10.

The police limited Yu's freedom of action in a significant way by keeping him separated from his wife; keeping her out when she tried to enter would also have signaled to a reasonable person in Yu's position that he was no longer free to leave the room. During that time the number of officers in the small room with him grew from one to three and he was asked almost 175 questions, many of which were clearly accusatorial.

These accusatory questions and comments conveyed clearly to Yu that Officer Mayo considered him a suspect. That Yu understood this is apparent from Yu's comment, made after his repeated denials had been ignored: "If I did it, I'm in Hell, in Earth you only put me in prison in years." Exhibit N, p. 22, line 9-10. This questioning was far more than a brief detention. Yet the tape-recorded interview continued without any *Miranda* advisement.

Miranda warnings should have been given to Yu at some point during this interrogation. For this reason, the trial court should have suppressed the statements. See *Miranda v. Arizona*, 384 U.S. 436, 479 (1966); *California v. Beheler*, 463 U.S. 1121, 1123-25 (1983); *People v. Mayfield*, *supra*, 14 Cal.4th at 732; *People v. Esqueda*, *supra*, 17 Cal.App.4th at 1450.

III. Regardless of whether Yu was "in custody", the statement was obtained in violation of the Fifth Amendment's protection against self-incrimination.

Whether a confession should be suppressed because of a *Miranda* violation or because it was involuntary in violation of the Fifth Amendment are "interrelated, but analytically distinct" questions. *Tankleff v. Senkowski*, 135 F.3d 235, 242 (2nd Cir 1998); *see also People v. Esqueda, supra*, 17 Cal.App.4th at 1483. The Fifth Amendment may require suppression of a statement despite technical compliance with *Miranda*. *Esqueda, id.* at 1487 (finding statement involuntary despite *Miranda* waiver). The Fifth Amendment, as well as California evidentiary law, requires that admissions or confessions be admitted only if they are voluntary and trustworthy. See *United States v. Hernandez*, 105 F.3d 1330, 1332 (9th Cir.), *cert. denied*, 118 S.Ct. 227 (1997) (corroboration of a defendant's admission or confession is required in order to serve as the basis for a conviction.); *People v. Jones*, 17 Cal.4th 279, 296, *cert. denied*, 506 U.S. 989 (1998). "The question raised by the due process clause [of the federal and California constitutions] in cases of claimed psychological coercion . . . is whether the influence brought to bear upon the accused were such as to overbear the defendant's will to resist and bring about statements or admissions not freely self-determined." *People v. Esqueda*, 17 Cal.App.4th at 1483.

Yu cannot have exercised a free and unconstrained will if he was questioned without an interpreter and he was never advised of his right to remain silent while being interrogated with increasing intensity. When the police would not let Yu's wife into the room where Yu

was being questioned, it is unlikely that he felt free either to leave or to refuse to answer any more questions. Both the tape and the transcript of the interview reveal a man wanting to agree with the investigator whenever possible and not call his daughter a liar, while not wanting to admit to crimes he didn't commit. Moreover, without an interpreter, Yu clearly did not understand all the questions and Officer Mayo misunderstood many answers. Under these circumstances, the statements Yu is alleged to have made by the prosecution, if he made them, cannot have been truly voluntary.

CONCLUSION

For the reasons stated herein, petitioner requests this court to grant certiorari to review the issues presented above.

Dated: November 23, 1999.

Respectfully submitted,

EPHRAIM MARGOLIN
Counsel for Petitioner

APPENDIX

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and
Respondent,

v.

SEVERIN YANWING YU,

Defendant and
Appellant.

A080570

(Alameda County
Super. Ct. No. CH-22856)

(Filed Jun. 8, 1999)

INTRODUCTION

Defendant Severin Yanwing Yu was found guilty of three counts of committing a lewd and lascivious act with sexual intent on a child of 14 or 15 by someone at least 10 years older (Pen. Code, § 288, subd. (c)(1)) and two counts of penetrating the genitals of a person under 16 with a foreign object for a sexual purpose (Pen. Code § 289 subd. (i)). Defendant committed these acts on his daughter. The jury found not true an allegation that he had substantial sexual contact with his daughter when she was under 14 (Pen. Code, § 1203.066, subd. (a)(8)). The jury also found him not guilty of having committed a lewd or lascivious act with sexual intent on his niece, a child under 14 (Pen. Code, § 288, subd. (a)), and found all enhancing allegations based on that charge not true. He was sentenced to two years in state prison.

Defendant makes the following claims on appeal: (1) his statement to police should have been excluded because it was obtained without *Miranda* warnings,[1] was involuntary in violation of his Fifth Amendment right against self-incrimination, and was untrustworthy; (2) the jury should have been instructed to view his statement with caution; (3) expert testimony on child sexual abuse accommodation syndrome (CSAAS) should have been excluded and the jury admonished sooner about its limited use; and (4) the evidence is insufficient to support the verdict. We affirm the conviction for the following reasons: No *Miranda* warnings were necessary because defendant was not in custody when he gave his statement. His statement was not involuntary because it was not the result of police coercion. His claim the statement is untrustworthy is waived because it is inadequately addressed on appeal. Because defendant's statement was tape-recorded, the cautionary instruction was not necessary. The CSAAS evidence was properly admitted because it dispelled a common misconception about child abuse victim behavior and rebutted defendant's attack on the credibility of the victims' molestation claims, and the court had no duty to warn the jury of its limited use sooner than it did. Finally, the verdict is supported by substantial evidence, consisting of defendant's daughter's testimony at the preliminary hearing and statements she initially gave to the investigating officer that defendant had molested her, even if she recanted those statements at trial.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

Factual and Procedural Background

1. *The Daughter's Statements*

In March 1996, after attending a school program on sexual abstinence, defendant's daughter Connie, then 15, filled out an anonymous course evaluation that asked students to list any further questions they might otherwise be embarrassed to ask. On the form, Connie asked the question, "how to resist father's sexual request." Her teacher became concerned and, recognizing Connie's writing, asked her about what she had written. Connie told the teacher that her father had touched her breasts and vagina while she was in bed. On March 13, the school contacted police, who came to the school and interviewed Connie.

Connie told police that her father had talked to her about sex, touched her breasts, and put his finger into her vagina on at least three occasions. On the last occasion, he also put her hand on his penis. She said he told her he was helping her to "relieve a special feeling" and to learn to masturbate to become more mature. The tape-recording of Connie's March 13 interview was played for the jury.

The next day, the police interviewed Connie at the police station. She repeated her claims, stating that her father had touched her breasts or vagina on four occasions and had put his finger into her vagina in three instances. The jury also heard a tape-recording of this March 14 interview.

The police interviewed Connie once more, on March 28, to clarify the dates of the molestations. She again gave

consistent statements about the nature of the molestations that occurred on each occasion. A tape-recording of that interview was played for the jury.

More than three months later, on July 2, Connie contacted the police and told them she had made up the molestation claims. She said she had lied because she hated her father for his bad temper and hoped her story would cause her parents to divorce. That tape-recorded conversation was also played for the jury.

Connie testified at defendant's preliminary hearing on August 14. Just before she testified, she asked a counselor from the Victim-Witness Division whether it was more important to be honest or obedient. The counselor told Connie it was more important to tell the truth. Connie's mother also told her before the hearing to tell the truth, as did the district attorney. Connie proceeded to testify under oath in accordance with her original statements to police that defendant had molested her. She explained that her July 2 retraction was false, the result of her concerns that the case was costing her parents a lot of money and that her father might be sent to prison.

At trial on March 4, 1997, Connie once again retracted her statements that defendant had molested her. She testified that she had told defendant about her "special feelings" and had asked him about masturbation, but he had told her to talk to her mother. She denied he had touched her or made her touch him inappropriately. When confronted with her preliminary hearing testimony, she disavowed most of it but acknowledged that more than once defendant had crawled into bed with her. She testified that she had made up the molestation claim

because she hated her father and hoped it would prompt him to leave home. She explained that her question on the course evaluation form was simply a ploy to get attention. And she claimed she had lied at the preliminary hearing because she felt pressured by the district attorney and did not want to get into trouble for having lied before. She did, however, acknowledge telling the district attorney that if she were the district attorney, she would take the case to trial in order to pursue justice.

2. *The Niece's Statements*

On March 14, police interviewed defendant's niece Yvonne, who lived with defendant's family. The police asked Connie to alert Yvonne about what the police planned to ask her. Connie testified that she told Yvonne she had told police that defendant had molested her three times but claimed she did not give any other details and did not tell Yvonne what to say. Yvonne then told police that defendant had touched her breasts three times outside her clothing. She also said defendant had climbed onto her while she was in bed. A tape-recording of this interview was played for the jury.

At trial, Yvonne retracted her accusations, testifying that she had lied to have a story like Connie's. She admitted that when Connie spoke to her just before she spoke to police, Connie had told her details about the molestations.

3. *Defendant's Statement*

On March 13, prompted by a phone call from Connie, Connie's parents came to her school. Connie's mother

went inside to find out what was wrong, while defendant waited in the car. Once Connie's mother was told of Connie's accusations, she asked her husband to go inside and clear up the problem. Defendant was calm and waited patiently to talk with the police. Following their interview of Connie, the police interviewed defendant. Defendant is an immigrant from Hong Kong, and his command of English is very poor. He told police that Connie had spoken to him about "special feelings" in her "Underpart" and that she had tried using a hot towel to relieve the feelings. The court denied defendant's motion to suppress his statements to police, and the tape-recording of his interview was played for the jury.

At trial, defendant claimed he was innocent. He denied touching his daughter's vagina or breasts, making her touch his penis, crawling into bed with her, or teaching her to masturbate to relieve her "special feeling." He denied touching his niece's breasts. He explained his pretrial statement to be the result of his misunderstanding of police questions and police misunderstanding of his responses. He provided the jurors with a transcript of what he had tried to say, which he created after listening to the tape of his interview more than 10 times. In addition, as he played the tape for the jury, he explained what he had understood by the questions and meant by his answers.

4. *Other Relevant Trial Evidence*

A prosecution expert in psychology and child molestation testified about CSAAS, explaining that one of

the common responses of children who have been sexually abused is to retract their accusations, as a result of family pressure among other things. On cross-examination, the expert acknowledged that his testimony helps explain only that retractions arc not inconsistent with molestation; it does not help determine whether molestation in fact occurred. He also acknowledged he had never examined the victims and could not say whether CSAAS would apply to them.

Another prosecution expert in traditional Chinese mental health testified that there is great pressure on individuals in the Chinese-American community to handle family matters privately to maintain family harmony. She testified that father-daughter molestation would be something the Chinese culture would want handled privately within the family.

Discussion

1. *Defendant's Statement was Properly Admitted*

Police interviewed defendant at his daughter's school. He voluntarily came to the school with his daughter and wife without being summoned by the police. He was already there when police arrived, although they did not know why. They did not tell him to wait there while they spoke with Connie. After hearing Connie's accusations against her father, the police decided to talk to him to find out if the accusations were true. The officer finished his interview of Connie and asked defendant to speak with him. The officer interviewed defendant in a small office with the door closed. Both defendant and the

officer were seated. About halfway through the interview, which lasted 18 minutes, a second officer came in. The parties disagreed about whether the second officer sat or stood behind defendant. The second officer did not ask any questions.

The interviewing officer characterized defendant as cooperative and the atmosphere as nonconfrontational. Defendant described the officer as polite. They disagreed about whether the officer raised his voice at defendant,[2] but both agreed the interviewing officer never made any threats to defendant. At the outset, the interviewing officer told defendant, "You don't have to talk to me." Defendant, however, felt subjectively that he could not refuse to talk with police. The police never told defendant he was not free to leave, either verbally or physically, and no one blocked the door. At the same time, they also did not tell him he *was* free to leave. At one point during the interview, defendant's wife came in and was asked by police to wait outside. Both officers had on uniforms and carried guns and handcuffs, but neither officer reached for his gun, displayed his handcuffs to defendant, or had any physical contact with defendant, although defendant stated they touched their gun holsters. Defendant saw the officers' guns and handcuffs. He testified that he was fearful. He felt subjectively he could not leave and did not ask to do so. No interpreter was present.

When the police concluded defendant had sufficiently confirmed Connie's accusations, they ended the

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[2] The audiotape does not reflect that the officer raised his voice at any time during the interview.

interview and arrested him. Until then, they had not given him *Miranda* warnings.

Before trial, defendant moved to suppress his statements to police. In addition to hearing testimony of the interviewing officer and defendant, the court heard the tape-recording of the interview. The court's impressions from listening to the tape-recording were as follows:[3] "[W]ith respect to [the issue of whether the situation was custodial], I have in mind what I heard in terms of my listening to the tape, the dialogue that went between the police officer[as] interviewer and the defendant as interviewee. There did not appear to be any hint of coercion. There is a lot of miscommunication, in a sense, perhaps even some frustration on the part of both the interviewer and the interviewee trying to understand each other. But to me this does not amount to coercion." With respect to the issue of trustworthiness, the court stated, "I think the statement itself is trustworthy. I think the statement reflects that there were considerable misunderstandings, miscommunications. So it reflects what went on. In terms of my hearing of the tape, it's clear that the defendant was saying what he wanted to say. It was not being understood clearly, perhaps." The trial court refused to exclude defendant's statement, concluding that *Miranda*

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[3] We have also listened to the audiotape of the interview of defendant and agree with the conclusions of the trial judge. Additionally, the tape reflects the defendant understood the officer's questions and his willingness and ability to explain his actions.

warnings were not required because defendant's questioning was not custodial and that the statement was trustworthy.

On appeal, defendant contends his statement to police should have been excluded because it was obtained without *Miranda* warnings, was obtained involuntarily in violation of his Fifth Amendment right against self-incrimination, and was untrustworthy.

A. *Because Miranda Warnings Were Not Required Before Questioning, Defendant's Statement Was Properly Admitted*

In *Miranda v. Arizona, supra,* 384 U.S. 436, the United States Supreme Court held that ' . . . the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination require(s) that custodial *interrogation* be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of in attorney.' [Citation.] . . . [¶] The '[f]ailure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda.*' [Citation.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033, italics added.) On review, we independently determine whether the questioning was "custodial." (*People v. Aguilera* (1996) 51 Cal.App. 4th 1151, 1161-1162.) Like the trial court, however, we conclude *Miranda* warnings were unnecessary because defendant was not in custody when questioned.

"Custody occurs if the suspect is physically deprived of his freedom of action in any way or is led to believe, as a reasonable person, that he is so deprived. [Citations.]" (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1050, internal quotation marks omitted.) " 'Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. . . . ' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 401-402, quoting *Thompson v. Keohane* (1995) 516 U.S. 99, 112.) " '[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.' (*Stansbury v. California* [(1994) 511 U.S. 318, 323].)" (*People v. Carpenter* (1997) 15 Cal.4th 312, 384.) The focus is on how a reasonable person in the suspect's circumstances " ' . . . would have understood his situation. . . . " (*People v. Boyer* (1999) 48 Cal.3d 247, 272, quoting *Berkemer v. McCarty* (1984) 468 U.S. 420, 442.) Of the numerous factors that are recognized as potentially relevant to the determination,[4] "[n]o one factor is

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[4] "Among [the factors] are whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such

dispositive. Rather, we look at the interplay and combined effect of all the circumstances to determine whether on balance they created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest." (*Aguilera, supra*, 51 Cal.App.4th at p. 1162.)

Here the questioning occurred in a school office, a neutral place unaffiliated with the police, not a jail cell or police station interrogation room. The police did not summon defendant, nor did they ask him to remain for questioning. At the start of the questioning, defendant was told he did not have to talk with police. Although two officers were present, only one asked questions. The interview lasted only 18 minutes, and even that length was undoubtedly due in part to the repetition and clarification required by the difficulty in communicating. At no time during questioning did the police draw their weapons, tell defendant he was not free to leave, or prevent him from leaving. Defendant's subjective beliefs

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freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation." (*Aguilera, supra*, 51 Cal.App.4th at p. 1162, citing *People v. Stansbury* (1995) 9 Cal.4th 824, 831-832; *People v. Lopez* (1985) 163 Cal.App.3d 602, 608; *People v. Spears* (1991) 228 Cal.App.3d 1, 25; *United States v. Griffin* (8th Cir. 1990) 922 F.2d 1343, 1348.)

about whether he had to stay or talk to police are irrelevant, (*Carpenter, supra,* 15 Cal.4th at p. 384.) We also do not believe a reasonable person would have felt he could not leave merely because his wife was asked to wait outside. The record discloses no aggressive or confrontational behavior by police, whose manner defendant described as polite, nor their use of any threats or coercive interrogation techniques. The judge, who heard the tape of the interview, reported that while he perceived frustration with the difficulty in communicating, he heard no hint of coercion, nor any fear in defendant's voice. While the judge noted that defendant expressed worry, it concerned going to Hell, not harm from police. Having listened to the tape ourselves, we too perceive neither coercion on nor fear. Although defendant was arrested at the end of the interview, we conclude that on balance the circumstances in which defendant was questioned did not create an atmosphere of police coercion "such that a reasonable person would have experienced a restraint tantamount to an arrest." (*Aguilera, supra,* 51 Cal.App. 4th at p. 1162.) We agree with the trial court that because defendant was not in custody, the police were not required to issue *Miranda* warnings before questioning him. The court's ruling was correct.

B. *Defendant's Statement Was Not Involuntary*

Defendant contends his statement to police was involuntary and therefore obtained in violation of his Fifth Amendment right against self-incrimination. The "privilege against self-incrimination prohibits the state from convicting a defendant on the basis of evidence

compelled from the defendant's lips." (*People v. Badgett* (1995) 10 Cal.4th 330, 346.) For purposes of the Fifth Amendment, the voluntariness of such evidence is determined by assessing it for compliance with constitutional due process guarantees. (*Miller v. Fenton* (1985) 474 U.S. 104, 110 ["Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations, *Miranda v. Arizona*[, *supra*, at p. 478], and is binding on the States, [citation], the Court has continued to measure confessions against the requirements of due process."].) An incriminating statement is involuntary, in violation of state and federal due process guarantees, where it was extracted by threats, violence, direct or implied promises, or the exertion of improper influence. (*People v. Benson* (1990) 52 Cal.3d 754, 778.) " '[Coercive police activity is a necessary predicate to the finding that a confession is not "voluntary". . . . ' (*Colorado v. Connelly* (1986) 479 U.S. 157, 167[ ].)" (*Ibid.*) As we concluded above, the circumstances in which defendant was questioned did not create an atmosphere of police coercion. Accordingly, defendant's statement was not involuntary, and his Fifth Amendment rights were not violated.

C. *Defendant Has Abandoned His Claim of Untrustworthiness*

Defendant provides no authority whatsoever to support the claim that his statement should have been excluded because it was "untrustworthy." We do not know on what legal basis, therefore, defendant contends the court erred. We also note that defendant provided no

authority for this claim to the court below either. Because defendant has inadequately addressed the claim, we reject it as abandoned on appeal. (*People v. Marshall* (1990) 50 Cal.3d 907, 945, fn. 9 [point is not properly raised on appeal if perfunctorily asserted without supporting argument].) We note, however, that defendant himself acknowledged the tape-recording was an accurate rendition of the interview, and the court concluded, after listening to the tape-recording, that even if there were some misunderstandings and miscommunications, it was clear that defendant was stating what he wanted to state and the tape-recording accurately reflected what occurred. We agree with that assessment.

2. ***Instructing the Jury to View Defendant's Statement With Caution Was Unnecessary***

On appeal, defendant contends the jury should have been instructed to view his statement with caution. Specifically, he claims the court erred by refusing to give the final sentence of CALJIC No. 2.71. The court read the first part of that instruction, which states, in relevant part, "You are the exclusive judges as to whether the defendant made an admission, and if so, whether such statement is true in whole or in part. If you should find that the defendant did not make the statement, you must reject it. If you find that it is true in whole or in part, you may consider that part which you find to be true." Over defendant's objection, the court did not include the final proposed sentence of CALJIC No. 2.71, which provides, "Evidence of an oral admission of a defendant should be viewed with caution." The court's refusal was correct.

"[A] trial court is required on its own initiative to instruct the jury that evidence of a defendant's oral admissions must be viewed with caution [citations], except that this cautionary instruction is inapplicable, and should not be given, if the oral admission was tape-recorded [citation]." (*People v. Mayfield* (1997) 14 Cal.4th 668, 776.) "The cardinal reason for the existence of the rule requiring the cautionary instruction with respect to oral admissions is based on the inability of a person to repeat exactly the words of another person. [Citation.] This common failure of memory or inability to recall a conversation with exactness does not exist where there is a reproduction by mechanical means of the declarant's voice and words, and where admissions are made and preserved through recording devices, the cautionary instruction need not be given with reference to such admissions. [Citation.] Obviously, a recording is more reliable and satisfactory evidence than testimony from memory; is more trustworthy; it reproduces the very words used by the person who made the statement. [Citation.]" (*People v. Jones* (1967) 254 Cal.App.2d 200, 222.)

Defendant's oral admission in this case was tape-recorded. Defendant contends the court should nonetheless have given the instruction because his statements on the recording were hard to understand and might not have constituted admissions. Defendant mistakes the instruction's purpose. It is not intended to cast doubt on oral admissions generally but rather on testimony purporting to relate an oral admission. (*Jones, supra,* 254 Cal.App.2d at p. 222.) In cases such as this, where another's testimony is not required to prove the oral

admission, the reason for giving the cautionary instruction is absent. The trial court's refusal to give the instruction was proper.

3. *Expert Testimony Was Property Admitted*

The court denied defendant's motion to exclude expert testimony on CSAAS and for a limiting instruction preceding the testimony. Instead, it gave a limiting instruction after the close of evidence, with the rest of the instructions. On appeal, defendant contends the CSAAS testimony should have been excluded[5] and, if it was properly admitted, the court should not have waited a week before instructing the jury on its limited use.[6]

A. *The CSAAS Evidence Was Properly Admitted*

A prosecution expert testified that child victims of sexual abuse often retract their accusations even though they have been molested. Defendant contends such evidence was improper because the jury would likely

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[5] At trial, defendant made a *Kelly/Frye* objection to the CSAAS evidence on the ground that it was not scientifically reliable. (*People v. Kelly* (1976) 17 Cal.3d 24, 30; *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013, 1014). On appeal, although he raised the *Kelly/Frye* argument at oral argument, he did not address it in his briefs, and we consider it abandoned. (*Marshall, supra*, 50 Cal.3d at p. 945, fn. 9.)

[6] At trial, defendant asked the court to give the instruction before the CSAAS testimony was heard. On appeal, defendant simply contends that giving the instruction one week after the testimony was too late to be effective.

misinterpret it as proof that molestation occurred. We disagree.

The prosecution expert explained the syndrome known as CSAAS. The syndrome evolved to explain the common responses of children who have been sexually abused. The expert testified that CSAAS has the following five symptoms: a sense of secrecy, i.e. the abuser tells the child to keep the sexual relationship secret; a sense of helplessness, i.e. the child feels powerless to stop the molestation or to disclose it; entrapment and accommodation, i.e. the child feels unable to stop the abuse and so adapts her behavior to make accepting it easier; delayed disclosure of the abuse; and retraction of any disclosure of abuse claims. While inadmissible to prove molestation occurred, CSAAS evidence is admissible to rebut a claim that certain behavior by a child molestation victim, such as recanting molestation accusations, is inconsistent with having been molested. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300.) In *People v. Bledsoe* (1984) 36 Cal.3d 236, 247-248, our Supreme Court concluded that psychological evidence based on the "rape trauma syndrome" could not be used to show a rape had actually occurred but was admissible to "disabus[e] the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths." This rule was extended to evidence of child abuse syndrome in molestation cases in *People v. Bowker* (1988) 203 Cal.App.3d 385, in which the court held that CSAAS testimony could not be used to prove child abuse but was admissible to dispel misconceptions about child abuse victims. (*Id.* at pp. 391-394.) Thus, for example, "[w]here

an alleged victim recants his story in whole or in part, a psychologist could testify on the basis of past research that such behavior is not an uncommon response for an abused child who is seeking to remove himself or herself from the pressure created by police investigations and subsequent court proceedings." (*Id.* at p. 394.)

CSAAS evidence is admissible as long as it is addressed to a specific "misconception" suggested by the evidence and the jury is admonished that "the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true . . . . The evidence is admissible *solely* for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested." (*Bowker, supra,* 203 Cal.App.3d at p. 394.) In this case, based on the prosecution's pretrial offer of proof as well as the testimony elicited from the expert, the CSAAS testimony was clearly intended to help explain Connie's and Yvonne's recantations of their molestation claims.

Moreover, when an expert gives general testimony about CSAAS behavior, has never examined the particular victims, and offers no opinion on whether their claims are true, there is little likelihood the jury will misinterpret the evidence as a "testimonial to [the victims'] credibility." (*People v. Housley* (1992) 6 Cal.App.4th 947, 955-956.) Here, contrary to defendant's claim, the expert did not suggest Connie's and Yvonne's molestation claims were true. Rather, he testified about typical molestation victim behavior, which happened to match theirs in certain respects. The expert stated in cross-examination that he had never examined either Connie or

Yvonne, and he offered no opinions about them. In fact, the defense elicited the expert's acknowledgement that recanting does not prove a molestation occurred and that the expert did not know whether there had been any molestation in this case. In these circumstances it would be unreasonable to conclude the jury misinterpreted the CSAAS testimony as proof the molestation claims were true.

Finally, where the defense itself has put the victims' credibility in issue, by casting doubt on their molestation claims, the CSAAS evidence is properly admitted to rehabilitate the victims' credibility. (*Housley, supra,* 6 Cal.App.4th at p. 956; *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1216.) Here, well before the court heard and denied defendant's motion to exclude the CSAAS testimony, the defense suggested that the victims' molestation claims were false and their recantations true, eliciting numerous reasons from them in cross-examination why they might have falsely accused defendant of molesting them. These theories included that Connie wanted attention, wanted her father to leave the house, was jealous of her father's relationship with Yvonne, had read about making false molestation claims in a magazine, was influenced by suggestive questions from police, and felt pressured by the district attorney, and that Yvonne wanted to be just like Connie, was influenced by what Connie had told her she had reported, was influenced by suggestive questions by police, and felt pressured by the district attorney. Once defendant cast doubt on the veracity of the victims' molestation claims, the

prosecution was entitled to rehabilitate the victims' credibility with evidence explaining that victims sometimes recant even if they have been molested.

We are satisfied the psychological testimony was properly used to aid the jury's assessment of the victims' behavior and to rebut defense evidence that the victims' claims of molestation were false.

B. *The Timing of the Limiting Instruction Was Proper*

While acknowledging the jury was instructed correctly that CSAAS evidence cannot be considered as proof that molestation occurred, defendant contends the instruction was not given soon enough to prevent the jury from doing just that. He argues the court should not have waited to give the instruction until its concluding instructions.

His argument "ignores a fundamental premise of the jury system, i.e., jurors are intelligent people who are capable of understanding and following the court's instructions. (*People v. Laws* (1993) 12 Cal.App.4th 796, 796 [ ].) . . . As explained in *People v. Dennis* (1998) 17 Cal.4th 468, 533-534 [ ], the trial court has broad discretion when to give limiting instructions. 'Thus, the trial court is not obliged to give limiting instructions the moment they are requested or when the limited evidence is presented; subsequent instruction can be sufficient in a proper case.' (*Id.* at p. 534.)" (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 407.) The court's refusal to instruct the jury early was not an abuse of discretion.

4. *Sufficient Evidence Supports the Verdict*

Finally, defendant contends the evidence is insufficient to support the verdict. Specifically, he argues the only evidence supporting the verdict was defendant's statement to police, which should not have been admitted, Connie's statements that she had been molested, which she recanted at trial, and the CSAAS testimony, which should not have been used to prove the molestations occurred. He also argues that the record contains evidence of defendant's innocence. His claim lacks merit.

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Barnes* (1986) 42 Cal.3d 284, 303 [ ]; *People v. Johnson* [(1980)] 26 Cal.3d [557,] 576-578.) On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*Johnson, supra,* 26 Cal.3d at pp. 576-577.) [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. (*Barnes, supra,* 42 Cal.3d at p. 303.) Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. (*Id.*, at pp. 303-304; [citation].)" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) Moreover, the fact that the evidence might support *a*

contrary finding is no basis for reversal. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

Here, Connie's pretrial statements that her father had molested her were ample substantial evidence on which to base the verdict, regardless of her recantation at trial. Her prior inconsistent statements were substantive evidence, whose credibility the jury was entitled to weigh against that of her statements at trial. (Evid. Code, § 1235; see also Cal. Law Revision Com., West's Ann. Evid. Code § 1235 (1995) pp. 224-225 ["Section 1235 permits an inconsistent statement of a witness to be used as substantive evidence. . . . "].) Thus, as detailed above, the jury learned that Connie had made specific claims on at least seven occasions regarding her molestation by her father; on her anonymous course evaluation, in her statement to her teacher when asked about the evaluation, in her statement to her cousin Yvonne before Yvonne was questioned by police, in her statements to police on March 13, 14, and 28, and in her testimony under oath at the preliminary hearing on August 14, in which she retracted an earlier recantation after being told it was more important to tell the truth than to be obedient. She confirmed at trial that at the preliminary hearing she had testified that her father had touched her "private area." She confirmed that at the preliminary hearing she had testified that her father had spoken to her of having gone to bed with other women, that the first time he touched her he had come into her bedroom wearing pajamas, lain down on the bed, gotten under the covers, and proceeded to tickle her. She confirmed she had testified that he had then touched her breasts and her vagina through her clothing and said it would make her feel better and make her more mature.

She confirmed she had testified that the second and third times he had touched her breasts underneath her clothing and put his finger into her vagina and that the third time he had also put her hand on his penis. Even apart from defendant's statement to police, whatever the jury might have concluded he was saying, or the CSAAS evidence, Connie's pretrial statements are substantial evidence the molestations occurred. If the jury found them more credible than her recantations at trial, it was entitled to do so, and we will not second-guess its assessment. (*Barnes, supra,* 42 Cal.3d at pp. 303-304.)[7] The jury was not compelled to accept evidence pointing to defendant's innocence.

From this evidence, a reasonable jury could have concluded that Connie was telling the truth when she made her pretrial statements that defendant had molested her and that her recantation at trial was false

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[7] See also California Law Revision Commission Comment, West's Annotated Evidence Code section 1235, *supra,* page 225 ("Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court.").

and the result of CSAAS and her cultural traditions. Her pretrial statements were substantial evidence from which the jury could conclude beyond a reasonable doubt that defendant had molested his daughter.

Disposition

The judgment is affirmed.

Walker, J.

We concur:

Corrigan, Acting P. J.

Parrilli, J.

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 3

(Filed Jul. 7, 1999)

THE PEOPLE,
Plaintiff and Respondent,
v.
SEVERIN YANWING YU,
Defendant and Appellant.

A080570
Alameda County No. CH22856

BY THE COURT:

The petition for rehearing is denied.

Date: Jul - 7 1999 McGuiness, P.J.

First Appellate District, Division Three, No. A080570
S080723

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v. (Filed Aug. 25, 1999)

SEVERIN YANWING YU, Appellant

Appellant's petition for review DENIED.

GEORGE
Chief Justice
